

POWDERHORN COAL CO.
v.
OFFICE OF SURFACE MINING AND ENFORCEMENT

IBLA 94-514, 94-589

Decided May 3, 1995

Appeal from a decision of Administrative Law Judge Ramon M. Child upholding a notice of violation (No. 93-020-370-001) for failure to reclaim a coal waste refuse pile contemporaneously with mining. Applications for review of a follow-up notice of violation (No. 93-020-370-001 as modified) and cessation order (No. 94-020-370-001).

Decision reversed; notice of violation and cessation order vacated.

1. Surface Mining Control and Reclamation Act of 1977: Temporary Relief:
Applications—Surface Mining Control and Reclamation Act of 1977: Temporary Relief: Evidence

An application for temporary relief from an NOV filed with the Office of Hearings and Appeals pending final resolution of an application for review may be granted when a hearing is held by an Administrative Law Judge in the locality of the permit area; the applicant shows a substantial likelihood of prevailing on the merits; and such relief will not adversely affect the health or safety of the public or cause significant, imminent environmental harm to land, air, or water resources. While temporary relief granted after a hearing before the Administrative Law Judge may lapse with the Administrative Law Judge's subsequent decision upholding the NOV, when the jurisdiction of the Board is invoked by a timely filed appeal, the Board has authority to reinstate such relief.

2. Surface Mining Control and Reclamation Act of 1977: Abatement: Remedial Actions—Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Remedial Actions—Surface Mining Control and Reclamation Act of 1977: Spoil and Mine Wastes: Generally—Surface Mining Control and Reclamation Act of 1977: State Program:
10-Day Notice to State—Surface Mining Control and Reclamation Act of 1977:
Topsoil: Redistribution

Upon review of action taken by the State regulatory authority in response to a 10-day notice, enforcement

action which is not arbitrary, capricious, or an abuse of discretion under the State appropriate integration is considered. Issuance of an NOV requiring permittee to amend the permit to stipulate to extend revegetation trials and submit the results to the State regulatory authority by a date certain and, further, to cover completed coal waste lifts to a depth approved by the authority based on the field trial results by a date certain may be found not to be an abuse of discretion under the rules of the State program, justifying vacating an NOV issued by OSM for failure to achieve contemporaneous reclamation.

APPEARANCES: John S. Retrum, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Denver, Colorado, for the Office of Surface Mining Reclamation and Enforcement; M. Julia Hook, Esq., and Kenneth D. Hubbard, Esq., Denver, Colorado, for the Powderhorn Coal Company.

OPINION BY ADMINISTRATIVE JUDGE GRANT

An appeal (IBLA 94-514) has been brought by the Powderhorn Coal Company (Powderhorn) from an April 25, 1994, decision of Administrative Law Judge Ramon M. Child, upholding notice of violation (NOV) No. 93-020-370-001 issued by the Office of Surface Mining Reclamation and Enforcement (OSM). The NOV was issued for surface impacts associated with underground coal mining operations at the Roadside/Cameo No. 1 Mine in Mesa County, Colorado. 1/ Subsequent to Judge Child's decision upholding the NOV in this case, related citations in this matter were written by officials of OSM which were also the subject of applications for review filed by Powderhorn with the Hearings Division, Office of Hearings and Appeals (OHA). Specifically, appellant filed an application for review of OSM's May 9, 1994, modification of NOV No. 93-020-370-001 and, also, an application for review of cessation order (CO) No. 94-020-370-001 issued June 3, 1994, for failure to abate the NOV.

1/ The NOV at issue in this appeal was the subject of an application for temporary relief, as well as the application for review, and a combined hearing was held on June 1 and 2, 1993 on the applications. A prior decision of the Administrative Law Judge dated June 2, 1993, granted the application for temporary relief from enforcement of the NOV. That decision was appealed by OSM to the Board which affirmed the grant of temporary relief. Powderhorn Coal Co. v. OSM, 129 IBLA 22 (1994), aff'd on reconsideration, 132 IBLA 36 (1995). Much of the factual background of this matter is set forth in our prior decision affirming the grant of temporary relief and pertinent parts of that factual record are restated here.

Powderhorn filed a motion to consolidate the latter applications for review with the appeal of Judge Child's decision affirming the original NOV. In support of the motion, Powderhorn noted that it had waived its right to an evidentiary hearing on these review applications, contending the sole issue is legal rather than factual. The applications for review were forwarded to the Board where they were docketed as IBLA 94-589. Counsel indicated that OSM had no objection to consolidation and since the outcome of these proceedings is controlled by the disposition of the appeal of the Administrative Law Judge's decision affirming the initial NOV, the appeal of Judge Child's decision was consolidated with the applications for review of the related NOV and CO by order dated July 21, 1994. Further, by order dated June 23, 1994, the Board in effect reinstated temporary relief granted by Judge Child and affirmed by the Board in Powderhorn Coal Co. v. OSM, 129 IBLA 22 (1994), thus precluding action on the modified NOV and the CO. ^{2/}

The instant case concerns surface reclamation operations conducted by Powderhorn in connection with the Roadside/Cameo No. 1 mine, under State permit C-81-041 issued by the Colorado Mined Land Reclamation Division (now the Colorado Division of Minerals and Geology (DMG)). At all relevant times, Colorado was a primacy State, meaning that it has primary jurisdiction over the regulation of surface coal mining operations (including surface reclamation operations in connection with an underground mine) on non-Federal lands under an approved State program. However, such jurisdiction is not exclusive. See 30 CFR 906.10. As we have long held, OSM has oversight authority under section 521 of the Surface Coal Mining and Reclamation Act (SMCRA), 30 U.S.C. § 1271 (1988), and its implementing regulations (30 CFR 842.11(b)(1) and 843.12(a)(2)) to intercede to enforce a state program where the state fails, after notice, to do so. ^{3/} See W.E. Carter, 116 IBLA 262, 266-67 (1990); Donaldson Creek Mining Co. v. OSM, 111 IBLA 289, 296 (1989), aff'd, Donaldson Creek Mining Co. v. OSM, No. 89-0314-P (CS) (W.D. Ky. July 18, 1991); Dora Mining Co. v. OSM, 100 IBLA 300, 302 (1987).

^{2/} In Powderhorn Coal Co. v. OSM (On Reconsideration), supra, we reaffirmed, as clarified, our Powderhorn decision. We stated therein:

"Thus, a substantial likelihood of success is properly found where, as in this case, the record on initial review appears insufficient to support the enforcement action taken." 132 IBLA at 40.

^{3/} In addition, to the extent that the permit area encompasses Federal lands, Colorado has primary authority over such lands, for the purposes of enforcing the State program, pursuant to a cooperative agreement between the Secretary of the Interior and the State. See 30 CFR 906.30. However, that does not preclude the exercise of OSM's oversight enforcement authority. See Kerr Coal Co. v. OSM, 131 IBLA 27 (1994).

In particular, OSM is required, where it has reason to believe that a permittee is in violation of a state program, to issue a 10-day notice (TDN) to the state. See 30 U.S.C. § 1271(a)(1) (1988); 30 CFR 842.11(b)(1). Unless the state, within 10 days of receiving the TDN, takes "appropriate action" to cause the violation to be corrected or shows good cause for failure to do so, OSM is required to immediately inspect the surface coal mining operation. See 30 U.S.C. § 1271(a)(1) (1988); 30 CFR 842.11(b)(1). "Appropriate action" is defined to include "enforcement or other action authorized under the State program to cause the violation to be corrected." 30 CFR 842.11(b)(1)(ii)(B)(3) (emphasis added). The term "appropriate action" is further defined by regulation as "an action or response by a State regulatory authority that is not arbitrary, capricious, or an abuse of discretion under the state program." 30 CFR 842.11(b)(1)(ii)(B)(2); see In Re Permanent Surface Mining Regulation Litigation, 653 F.2d 514, 523 (D.C. Cir.), cert. denied, 454 U.S. 822 (1981) ("[T]he Secretary will not intervene unless [the state's] discretion is abused").

The fact that a state has taken some action to enforce the regulatory requirements by issuing an NOV is not dispositive of the question of whether the state regulatory authority has taken appropriate action. See Turner Brothers, Inc. v. OSM, 92 IBLA 320, 323 (1986). Where OSM finds that the state has failed to take appropriate action to cause the violation to be abated, it is obligated to conduct an inspection. If, as a result of its inspection, OSM determines that the permittee remains in violation of the state program, it is required to issue an NOV where the violation does not create an imminent danger to public health or safety or is not causing or reasonably expected to cause a significant, imminent environmental harm to land, air, or water resources. See 30 CFR 843.12(a)(2); Dora Mining Co. v. OSM, supra at 302.

In the present case, OSM had, as a result of a December 3, 1992, inspection by OSM inspector Mitchell S. Rollings, reason to believe that Powderhorn was in violation of certain provisions of the Colorado program relating to the reclamation of coal mine waste banks. At the time of his inspection, Rollings concluded that Powderhorn had failed to cover the completed portions of two coal mine waste banks (known as Cameo Refuse Disposal Areas (CRDA) Nos. 1 and 2) at the Roadside/Cameo No. 1 mine with "a minimum of 4 feet of the best available non-toxic and non-combustible material," as required by Rule 4.10.4(5) of the Colorado program. ^{4/} In

^{4/} Rule 4.10.4(5) provides that

"[f]ollowing grading of the coal mine waste bank, the site shall be covered with a minimum of 4 feet of the best available non-toxic and non-combustible material * * *. The coal mine waste bank shall be revegetated in accordance with [rule] 4.15. [DMG] may allow less than 4 feet of cover material based on physical and chemical analyses which show that the requirements of [rule] 4.15 will be met."

addition, Rollings determined that Powderhorn had failed to undertake such action "as contemporaneously as practicable with mining operations," in accordance with Rule 4.13 of the Colorado program. 5/

The record indicates that, during the course of mining operations at the Roadside/Cameo No. 1 mine, Powderhorn generated waste materials (consisting largely of poor quality, fine grained coal and some shale and sandstone) as a result of washing the coal extracted from the mine. See Tr. 20, 175. These materials were required to be stored in permanent coal mine waste banks within the permit area. Each of these banks was to consist of a series of "lifts," i.e., piles composed of a succession of

2-foot compacted layers of waste material with sloping sides rising

50 feet to a 10-foot wide bench or terrace and topped by succeeding lifts of 30 feet separated by benches. See Tr. 21, 24-25, 25-26, 27, 131-32, 164; Exhs. R-2, R-4, R-5, and A-7B at 4. At the time of the December 1992 inspection, Powderhorn had already commenced construction of two coal mine waste banks (CRDA Nos. 1 and 2) within the permit area. See Tr. 20, 102, 103; Exh. A-7B at 4. CRDA No. 1 included three lifts that had been completed by February 1986 and CRDA No. 2 consisted of two lifts that had been completed by October 1991. See Tr. 24-25, 25-26, 30, 33-34, 35-36, 103, 166, 167; Exhs. R-6 and R-7.

In December 1992, Rollings found that Powderhorn had, at that time, failed to cover the exposed faces of the completed lifts in the two coal mine waste banks with any appropriate material. See Tr. 30, 31-32; Exh. R-8 at 6, 7. He also noted that this failure had persisted since the completion of the lifts in February 1986 (in the case of CRDA No. 1) and October 1991 (in the case of CRDA No. 2). See Tr. 32, 37. Accordingly, he issued TDN No. 92-020-370-003 to the State on December 11, 1992, notifying it that Powderhorn had failed to cover the coal mine waste banks with appropriate material contemporaneously with mining operations, in violation of Rules 4.10.4(5) and 4.13. See Tr. 37-38; Exh. R-8 at 1.

In response to the TDN, DMG notified OSM by letter dated December 29, 1992, that it did not believe that Powderhorn had violated Rules 4.10.4(5) and 4.13. The basis for this position was that, although Powderhorn had not covered the coal mine waste banks with appropriate material contemporaneously with mining operations, it was not practicable to do so since DMG had yet to determine whether it was necessary to place a minimum of 4 feet of such material on the completed lifts. DMG noted that any effort

fn. 4 (continued)

Rule 4.15.1(1) of the Colorado program requires in general that a mine operator "establish on all affected land a diverse, effective and permanent vegetation cover."

5/ Rule 4.13 provides that "[r]eclamation efforts, including, but not limited to, * * * topsoil replacement and revegetation, of all land that

is disturbed by surface coal mining operations shall occur as contemporaneously as practicable with mining operations."

to do so (absent such a determination) might unnecessarily disturb the area which would provide the cover material, and, in any case, reclamation was assured by virtue of the existence of an adequate bond. See Exh. R-9 at 2. Hence, DMG initially took no enforcement action. See Tr. 41.

The record indicates that Powderhorn had been authorized under its State permit, pursuant to Rule 4.15.6 of the Colorado program, to conduct a field trial study on another coal mine waste bank for the purpose of demonstrating whether less than 4 feet of appropriate material would permit the adequate revegetation of the coal mine waste banks in the permit area (including CRDA Nos. 1 and 2). ^{6/} See Tr. 45, 53, 165; Exhs. A-7D at 1, R-1 at 6, and R-9 at 1, 4. In the event that DMG determined, on the basis of this study, that the banks could be adequately revegetated with less than 4 feet of appropriate material, it was authorized by Rule 4.10.4(5) to allow the placement of less than 4 feet of such material. Powderhorn's engineer testified that there was reason to believe based on studies that less than 4 feet of cover would work (Tr. 144-45).

The study was originally intended to last only 5 years and the permit terms at the time of the OSM inspection provided the study was to be completed in 1988 (Tr. 78; Exh. R-1 at Stip. 6, Exh. R-9 at 1). The record indicates that results of the 1988 study were submitted to DMG which found the results inconclusive. Although the DMG staff recommended approval of less than 4 feet conditioned upon a "demonstration that revegetation success criteria be met in the field trials during years 9 and 10," no amendment of the permit was undertaken prior to the OSM inspection (Tr. 148; Exh. R-9 at 2).

Upon review of the DMG response to the TDN, OSM determined on January 15, 1993, that the State had failed to take appropriate action in response to the TDN. In a letter of that date to DMG, OSM noted that the permit had not been revised to authorize use of less than 4 feet of cover material on the lifts conditioned upon results of an extended field trial (Tr. 48; Exh. R-10 at 3).

Thereafter, responding to the OSM assertion that DMG had not taken appropriate action to abate the violation, DMG issued NOV No. C-93-004 on January 29, 1993, citing Powderhorn with a violation of Rules 4.10.4(5) and 4.13 due to its "failure to perform contemporaneous reclamation" on the 5 completed lifts that make up CRDA Nos. 1 and 2 (Tr. 51-52; Exh. R-11 at 4-5). The required abatement for the NOV involved filing a technical revision of the permit with DMG containing a two-part stipulation by Powderhorn. First, Powderhorn was required to submit the results of the 1993 vegetation study to DMG by September 1, 1993, with DMG agreeing to

^{6/} Rule 4.15.6 provides that a "permittee shall be encouraged to establish small test plots of limited planned duration, intended to assess the effectiveness of proposed * * * revegetation plans."

make a finding on the acceptable cover depth within 30 days (Exh. R-11 at 6). Further, Powderhorn was required to stipulate to placing "4 foot or depth approved by [DMG], of non-toxic, non-combustible cover on lifts 1, 2 and 3 of CRDA No. 1, and lifts 1 and 2 of CRDA No. 2 by September 1, 1994" (Exh. R-11 at 6). The time for abatement was specified in the NOV as March 16, 1993 (Exh. R-11 at 5). It appears from the record that Powderhorn complied with the abatement requirements of the NOV issued by DMG (Tr. 160).

OSM found that the abatement measures required in the NOV issued by DMG did not "adequately require compliance with the approved State program" (Exh. R-12 at 1). Specifically, OSM objected that [d]eferral of on-the-ground abatement of these violations for another one and a half years is inappropriate" (Exh. R-12 at 1). OSM took the position that abatement was required within 90 days (Tr. 55). According to OSM, the relevant rule required 4 feet of cover material on coal mine waste banks unless DMG has approved a different depth based on an approved analysis. Since no approval had been granted for a lesser depth, Powderhorn was obligated to cover the completed lifts with 4 feet of cover material (Exh. R-12 at 2). The OSM response also stated that DMG had not provided documentation from the approved permit that the field trials had been extended. Id.

As a consequence of the OSM finding, inspector Rollings conducted a follow-up inspection of the permit area on February 22, 1993, observing that no effort had been made to cover the completed lifts that make up CRDA Nos. 1 and 2 with appropriate material. See Tr. 62; Exh. R-13 at 3, 6. On February 23, 1993, he issued NOV No. 93-020-370-001, citing Powderhorn for violation of Rules 4.10.4(5) and 4.13. See Exh. R-13 at 1-2. For abatement measures, Powderhorn was required by the NOV to cover the completed lifts with 4 feet of appropriate material by April 23, 1993. 7/ See Exh. R-13 at 2.

On March 24 and 26, 1993, Powderhorn, pursuant to section 525 of SMCRA, 30 U.S.C. § 1275 (1988), filed applications seeking review of OSM's NOV and temporary relief therefrom. Subsequently, Judge Child held a two-day hearing into the matter on June 1 and 2, 1993. Following the ruling of the Administrative Law Judge granting temporary relief and the Board decision affirming that ruling, Judge Child issued his decision on the merits of the NOV without holding any further hearing.

The Administrative Law Judge ruled that the abatement action required by DMG violated Rule 5.03.2(2) requiring corrective action to abate a violation within 90 days (Decision at 9). Thus, the deadline for abatement of the violation by September 1, 1994, was found to be an unwarranted

7/ By verbal order dated Apr. 21, 1993, Judge Child amended the abatement deadline, in accordance with a stipulation of the parties, to June 2, 1993. See Tr. 70.

extension of the allowed time without a showing of good cause. Further, Judge Child held that submission by the applicant of the technical revision of the permit by March 16, 1993, did not alter this finding, adopting the view of Inspector Rollings that a "future revision to a permit does not abate the past violation of a performance standard" (Decision at 9-10). The Administrative Law Judge also held that the abatement measures required by the State violated its own rules requiring contemporaneous reclamation of waste piles with a minimum of 4 feet of appropriate material upon completion of a lift unless or until DMG had made a finding that a lesser depth would meet the requirements of Rule 4.15 (mandating effective and permanent revegetation). Judge Child held that nothing in Rules 4.10.4(5) and 4.13 authorizes the abatement provided by the NOV issued by DMG. Accordingly, he held that OSM properly found the response of DMG to the TDN to be arbitrary, capricious, and an abuse of discretion, thus justifying issuance of the NOV by OSM. ^{8/}

In its brief on appeal from the Administrative Law Judge's decision, Powderhorn asserts that the NOV issued by DMG in response to the TDN constituted appropriate enforcement action under the State program to cause the violation to be corrected. ^{9/} Hence, it is contended that the DMG's enforcement action was not arbitrary, capricious, or an abuse of discretion. Consequently, it is argued that OSM erred in issuing the NOV which the Administrative Law Judge upheld.

Regarding the question of temporary relief pending review of the Administrative Law Judge's decision upholding the NOV on the merits, Powderhorn argues that the temporary relief previously granted by Judge Child (and affirmed by the Board on appeal) has the effect of suspending the effect of the NOV pending review before the Administrative Law Judge and before the Board. In support of its contention, Powderhorn cites the case of Shawnee Coal Co. v. Andrus, 661 F.2d 1083 (6th Cir. 1981). Thus, Powderhorn asserts that the grant of temporary relief did not expire with the decision of Judge Child on the merits.

^{8/} In support of his decision, Judge Child also found that the NOV issued by DMG had not addressed abatement of problems with the East collection ditch on CRDA 2 (Decision at 11). However, as OSM acknowledges in its July 28, 1994, brief on appeal at pages 11-12, the TDN issued to DMG did not address that matter. See Exh. R-8.

^{9/} As we noted in our decision affirming the grant of temporary relief, Powderhorn does not argue that the State's failure to do anything in December 1992 constituted appropriate action. Rather, it contends that DMG's issuance of the State NOV in January 1993 was appropriate action. See Tr. 11-12; Application for Review, dated Mar. 23, 1993, at 6-7. Powderhorn objects to OSM's conclusion that the abatement provided for in the State NOV was inappropriate. See Tr. 171-72; Application for Review, dated Mar. 23, 1993, at 7-9.

In response, OSM has defended the decision of the Administrative Law Judge upholding the NOV originally issued in this case. It is contended that the abatement specified in the NOV issued by DMG in response to the TDN was not authorized under the Colorado program. OSM bases this contention on the fact that the abatement period exceeded the 90-day time limit, the NOV authorized placement of less than 4 feet of cover on the waste piles, and the NOV failed to require reclamation as contemporaneously as practicable.

OSM also challenges the authority of the Board to grant temporary relief in the context of the present appeal. It is asserted that the previous grant of temporary relief from the NOV, affirmed by the Board on appeal, expired at the time Judge Child issued his subsequent decision on the merits sustaining the NOV. OSM argues that only the Hearings Division (as represented by the Administrative Law Judge) has the authority to hold hearings and make initial decisions regarding applications for temporary relief. It is charged by OSM that the Board did not make the findings required by statute as a prerequisite to the grant of temporary relief and, in particular, it is argued that a finding of substantial likelihood of success on the merits (one of the indispensable factors) could not be sustained following Judge Child's decision on the merits.

[1] As a threshold matter, we address the issue of temporary relief in the context of this case. Under section 525(c) of SMCRA an application for temporary relief pending final resolution of an application for review may be granted when a hearing is held in the locality of the permit area; the applicant shows a substantial likelihood of prevailing on the merits; and such relief will not adversely affect the health or safety of the public or cause significant, imminent environmental harm to land, air, or water resources. 30 U.S.C. § 1275(c) (1988); see 43 CFR 4.1263. The regulations provide that the Administrative Law Judge (for the Hearings Division, OHA) has the jurisdiction to hold a hearing and make an initial ruling on an application for temporary relief. 43 CFR 4.1262. Appeals from such rulings are decided by the Board of Land Appeals. 43 CFR 4.1267. Such a hearing preceded the Administrative Law Judge's grant of temporary relief regarding the original NOV in this case. As noted previously, 10/ the Board upheld the Administrative Law Judge's decision after a hearing granting temporary relief from the original NOV on the ground that the statutory criteria had been met. Accordingly, OSM is in error in its assertion that the Board made no finding of the existence of the statutory criteria for temporary relief. Such a finding was made in our Powderhorn decision on temporary relief. Notwithstanding the fact that the temporary relief previously granted may have lapsed with the issuance of Judge Child's decision on the merits, when our jurisdiction was again invoked by Powderhorn's appeal of that decision, we had authority to reinstate temporary relief. Under the unique facts of this case, that is what we

10/ See notes 1 and 2, supra.

did. The effect of reinstating temporary relief was to preclude action on the original NOV, and because of the consolidation, action on the subsequent enforcement actions, as well. 11/

[2] With respect to the appeal of the NOV, we find that the relevant rules in the Colorado program must be read together in a manner which gives meaning to all of the rules. Rule 4.10.4(5) requires reclamation of completed lifts with 4 feet of appropriate cover material unless DMG has approved a lesser depth based on evaluation of studies. Further, Rule 4.15.6(1) provides that the "permittee shall be encouraged to establish small test plots of limited planned duration, intended to assess the effectiveness of proposed or ongoing revegetation plans." In the present case, the original study planned to be completed in 1988 produced results which DMG found inconclusive, leading to a recommendation to extend the study before reaching a conclusion. Rule 4.13 requires that "[r]eclamation * * * of all land that is disturbed by surface coal mining operations shall occur as contemporaneously as practicable with mining operations." The real issue here is not compliance with the requirement to cover completed lifts with 4 feet of cover material, but rather, compliance with the contemporaneous reclamation requirement. Thus, the view embraced by Inspector Rollings and adopted by Judge Child that a "future revision to a permit does not abate the past violation of a performance standard" obscures the issue. Powderhorn was cited by DMG for failure to reclaim contemporaneously in accordance with the existing permit provisions, requiring completion of field trials and covering of completed lifts of waste piles to an approved depth in 1988. The utility of field trials encouraged by the rules and the authority to allow less than 4 feet of cover where studies indicate that this will accomplish effective reclamation would be rendered substantially meaningless if contemporaneous reclamation necessarily requires 4 feet of cover on completed lifts in the absence of "prior" authorization of less than 4 feet. Indeed, such an interpretation of the requirement would render the initial permit which authorized the field trials ending in 1988 invalid.

It is clear from the record that OSM acted properly in issuing the TDN in this case for lack of contemporaneous reclamation upon discovery of the unreclaimed waste disposal piles existing after the close of the study period initially authorized by the permit. Mining and reclamation operations must be carried out in accordance with the current permit provisions. Rith Energy, Inc., 101 IBLA 190, 194 (1988); see Turner Brothers, Inc. v. OSM, 92 IBLA 381, 388 (1986). Similarly, the initial response of DMG to the TDN was not apparently appropriate action to secure abatement of the violation. However, the same conclusion does not follow from the subsequent NOV written by DMG. The citation requiring Powderhorn to file an amended permit obligating it to submit results of extended vegetation

11/ The consolidation of these cases was predicated on the finding that the validity of these enforcement actions was contingent upon the validity of the underlying NOV.

studies by September 1993 and to conclude reclamation of completed lifts by September 1994 in compliance with the cover requirements set by DMG based on the study results appears from the record to be a reasonable means of securing reclamation of the lifts as contemporaneously as practicable consistent with mining operations. Action by DMG which is not "arbitrary, capricious, or an abuse of discretion" under the State program shall be considered "appropriate action" to secure abatement of a violation. 30 CFR 842.11(b)(1)(ii)(B)(2). Hence, we must reverse the finding of the Administrative Law Judge on the record that the NOV issued by DMG was an abuse of discretion under the State program, a prerequisite for issuance of the OSM citation. Accordingly, the follow-up citations issued by OSM, based on the original NOV, must be vacated.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of Judge Child sustaining the NOV is reversed and the subsequent NOV and CO based thereon are vacated.

C. Randall Grant, Jr.
Administrative Judge

I concur.

Gail M. Frazier
Administrative Judge